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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANGEL A. MOLINA, Defendant and Appellant.	B210718 (Los Angeles County Super. Ct. No. PA059233)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara Scheper, Judge. Affirmed in part and reversed and remanded in part.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Angel A. Molina appeals from the judgment on his convictions of attempted murder, assault with a firearm, possession of a firearm by a felon and shooting at an occupied vehicle and the true findings on gang enhancement. He also challenges his sentences on the gang enhancement. Specifically, he claims that the court erred in admitting the testimony of two police officers that related to the jury a partial license plate number of the get-away vehicle. Appellant argues that because the eyewitnesses who provided the partial license plate number to police did not testify at trial the partial plate number was inadmissible hearsay and violated his right to confront his accusers under the Sixth Amendment. As to the gang enhancement, appellant argues that there was insufficient evidence to support the gang expert's conclusion that the crimes were gang-related under Penal Code section 186.22. Appellant's claims concerning the guilt phase of his trial lack merit. First, the court properly admitted the partial plate number provided to officers shortly after the shooting because the witness' statements relating the plate number qualified as a spontaneous utterance and because the statements were non-testimonial. Furthermore, the evidence presented at trial was sufficient to show that the attempted murder was gang-related. However, the sentences on the gang enhancements on counts 1 and 2 violated Penal Code section 186.22, subdivision (b) and thus cannot stand. Accordingly, this matter is remanded to correct appellant's sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On May 5, 2007, at about 1:00 p.m., Jorge Leon and Jesus Bravo, both members of the Pacoima Van Nuys Boys ("VNB") criminal street gang sat in Leon's Pontiac while the vehicle was parked in front of the Pierce Park Apartments at 12700 Van Nuys Boulevard (the "Pierce Apartments") in the San Fernando Valley. The Pierce Apartments are located within the territory claimed by the VNB gang, and the Pierce Apartments was described as the "main hang-out" for VNB gang members. An eyewitness, Ruben Lopez, who sat in a vehicle parked behind the Pontiac stated that he observed two Hispanic males approach the Pontiac. One of the men carried a gun which

looked like a small Uzi and the other, later identified as appellant, carried a 9-millimeter gun.[1]

Appellant is a member of the Pacoima Humphrey Boys ("PHB") criminal street gang—a rival gang of VNB. The man with the Uzi stood on the passenger side of the Pontiac; he made some hand signs[2] and "flashed" the gun towards the men in the Pontiac, appearing to threaten them. Lopez observed appellant step down off of the sidewalk and proceed towards the driver's side of the car. Leon and Bravo exited the Pontiac and began to run on Van Nuys Boulevard towards Glenoaks (towards the vehicle in which Lopez sat). Lopez saw appellant shoot at Bravo and Leon as they ran away; bullets hit the vehicle where Lopez sat.[3] Appellant and the man with the Uzi gave chase but Bravo and Leon managed to escape unharmed when they ran inside a nearby discount store.

Ruben Salcedo, who was standing on the sidewalk at a yard sale across the street from the Pierce Apartments at the time of the shooting, heard the gunshots. He also saw appellant and the man with the Uzi chasing Leon and Bravo. Salcedo stated that appellant was the only shooter. Salcedo saw appellant and the man with the Uzi get into a white van and drive away. Salcedo wrote down three numbers from the van's license plate on his hand. Salcedo stated that he showed the numbers to a male police officer, but at trial he could not remember the numbers or that officer's name. Salcedo also stated that he showed the numbers on his hand to another eyewitness, Rosalina Espinoza, who wrote down the numbers on a piece of paper.

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1 Although Lopez was unable to identify appellant from a photo array, a gang book and the live line-up, Lopez identified appellant at trial as the man who carried the 9-millimeter gun.

2 Lopez showed the jury the hand signs and the prosecutor described them on the record as: "both hands in front of him with his index finger and the middle finger on each hand, the thumb pointing up, the index finger and the middle fingers pointing at each other, and both thumbs pointing up and he moved his hands up and down. . . ."

3 Lopez was struck in the chin by one of the bullets.

Rosalina Espinoza, who lived in the Pierce Apartments with her daughter Rosalina Garnica, was also across the street at the yard sale when the shooting occurred. According to Espinoza, after the gunfire, she saw two men run from the Pontiac while two men with guns chased them. Espinoza identified appellant at the live line-up, the preliminary hearing and at trial as one of the shooters. After Leon and Bravo escaped, Espinoza saw appellant and the other assailant get into a white van and drive away. Espinoza saw a few characters from the van's license number and tried to memorize them. She saw the number 5, a letter which was either a Y or G and a 7. She also saw another man, Salcedo, writing something on his hand; Espinoza found a small piece of paper, and Espinoza or Salcedo wrote the characters on the paper. Espinoza said that she gave the piece of paper to a male police officer. Espinoza stated that she was very nervous at the time and that Salcedo was also nervous; Salcedo told her that he did not want to be involved.

Espinoza's daughter, Rosalina Garnica, also witnessed the incident. Garnica was stepping out of the door of the Pierce Apartments when she saw Leon and Bravo running past and "jumping on top of cars" as they ran down Van Nuys Boulevard towards Glenoaks. She saw two males chasing them. Garnica identified appellant from a photo array, at the preliminary hearing, and at trial as one of the males chasing Bravo and Leon.[4] Garnica said that she recognized appellant from that day because he stood only about 15 feet away from her and he stared at her.

The Los Angeles Police Department (LAPD) responded to the scene within 20 minutes of the shooting. The first officers to arrive were officers from the gang unit, including Officer Tamara Kane. Officer Kane described the scene of the crime as "chaos" with people running around; she stated that the people present were "frantic." She indicated that an unknown Hispanic male approached her and gave her a partial license plate number of the van. The male stated that he saw the get-away van in front of the Pierce Apartments as it was leaving the scene. Officer Kane also stated that the man

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[4] Garnica did not identify appellant at the live line-up.

who gave her the partial plate number was nervous. Officer Kane thought she wrote the number down on a small card. Officer Kane stated that the plate characters given to her were a "5G577." Officer Kane further indicated that she was approached by several Hispanic females at the time and that she did not interview them, but instead asked the witnesses to step aside until other officers could speak with them. Officer Kane stated that she gave the partial license plate number to the "primary unit" of LAPD officers, Officers Alan Martinsen and Rebecca Smalling, and another gang officer who arrived at the scene shortly thereafter.

Officer Martinsen indicated that he and his partner, Officer Smalling, arrived at the crime scene between 1:20-1:25 p.m. When he arrived, a female gang officer[5] gave him a partial license plate number which was written on a small piece of paper. The gang officer did not indicate who gave her the partial plate number, or who wrote the numbers on the card. The gang officer took Officer Martinsen to speak with an Hispanic female, Alex Arredondo. Officer Martinsen showed Arredondo the card with the partial plate number and Arredondo confirmed the characters.[6] Officer Martinsen proceeded to write the partial plate number in his field officer notebook. Officer Martinsen spoke with Arredondo for approximately 3-4 minutes. Officer Martinsen also spoke with Salcedo and Espinoza, but stated that neither of them supplied him with the partial license plate number. Officer Martinsen included the partial plate number in a police broadcast to other officers.

LAPD Gang Officer Pedro Cabunoc heard the radio broadcast of the partial plate number and the description of the get-away van. Cabunoc knew that appellant had been seen in such a van; appellant's then girlfriend Maira Solis owned a white van with a license plate number "4GHT577." The VNB and PHB were at war at the time. Officer

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5 Officer Martinsen could not remember the name of the gang officer.

6 Officer Martinsen assumed that Arrendondo was the source of the information that was on the card given him by the female gang officer. Officer Martinsen did not keep the card with the plate number, which the gang officer had given him.

Cabunoc also indicated that he believed this shooting was retaliation for murder of a PHB member the prior week. Officer Cabunoc "put two and two together" and surmised that appellant might be involved in the shooting. When questioned by police on the day of the shooting, Solis told officers that appellant had her van at the time and they were separated.

On May 21, 2007, appellant was arrested. Appellant was charged with: (1) attempted, willful, deliberate, premeditated murder (counts 1-2); (2) assault with a firearm (counts 3-5); (3) possession of a firearm by a felon (count 6); and (4) shooting at an occupied motor vehicle (count 7). As to all counts it was further alleged that they were committed for the benefit of a street gang under Penal Code section 186.22 and as to certain counts that appellant discharged and personally used a firearm and in connection with count five that he inflicted great bodily injury. The jury found appellant guilty on all counts and found the special allegations true.

The court sentenced appellant to a total prison term of 117 years to life.

Appellant filed a timely appeal.

DISCUSSION

I. **Admission of the Partial License Plate Number of Appellant's Get-Away Vehicle did not result in Prejudicial Error, nor Did it Violate Appellant's Sixth Amendment Rights**.

In this court, appellant argues that the trial court should have excluded evidence of the partial license plate number given to Officer Martinsen by Alex Arredondo and given to Officer Kane by the unknown Hispanic male because neither witness testified at trial. Appellant asserts the statements of these witnesses are inadmissible hearsay because those statements did not qualify as an excited utterance under Evidence Code section 1240 and because admission of the statements violated his Sixth Amendment right to confront his accusers under *Crawford v. Washington* (2004) 541 U.S. 36.

1. Relevant Factual Background.

After Officer Martinsen testified at trial that he had been given a card with the partial license plate number by an LAPD female gang officer and that he had shown the card to Alex Arredondo, who confirmed the numbers as 5G77, appellant's counsel moved to strike Officer Martinsen's testimony concerning the partial plate number. Appellant argued that no proper foundation had been laid for the evidence, that the testimony was inadmissible hearsay and that the admission of the partial plate number violated his right to confront Alex Arredondo, who had not been located at the time of trial. The prosecutor pointed out that other witnesses, including Salcedo and Espinoza had written down the partial plate number and claimed to have provided the information to police, and that the partial plate number could be introduced for the non-hearsay purpose of showing what actions the police took with it.

The court denied the motion to strike, stating that the license plate number "comes in either as non-hearsay altogether as not being offered to prove the truth of the matter or an exception in that it just explains what the officers did next, which was to put out a crime broadcast." The next day, however, the court stated that it was "troubled" by the prior day's discussion regarding the admissibility of the partial license plate number. The court indicated that it thought there were two issues—whether the partial plate number was offered for a non-hearsay purpose; and whether, if offered for the truth of the matter, a possible hearsay exception existed. Appellant argued that he was concerned that he could not cross-examine Arredondo, pointing out that several days after the shooting, when Arredondo was further questioned by police she denied that she had provided the officers with the partial plate number as had been stated in the police report. The court indicated that it wanted to "revisit" the issue.

The next day the court indicated that it had reviewed the case law, including *Crawford*, and noted that if the prosecutor relied on a "chain of evidence" that was supported by Salcedo and Espinoza, there was no confrontation issue because both witnesses had testified at trial and were subject to cross-examination. The court also

stated that two hearsay exceptions existed for their testimony—spontaneous utterance and past recollection recorded. Nonetheless, the court indicated that "problems" existed with Officer Martinsen's testimony because Officer Martinsen indicated that neither Salcedo nor Espinoza were his source for the information, but instead that he received the partial plate number on a card from the gang officer and had been directed to Arredondo who verified the plate number. The court noted that because Arredondo was not available for trial both a hearsay and confrontation clause issue existed.

Appellant conceded that no confrontation clause problem or hearsay problem existed as to the testimony of either Salcedo or Espinoza. Appellant agreed that if their statements were hearsay, they could be admissible as spontaneous statements under Evidence Code section 1240. However, appellant maintained that there was no evidence that Arredondo's statement to police qualified as an excited utterance and that he did not have the opportunity to confront her; appellant stated that he was basing most of his argument on *Crawford.* The prosecutor stated that the spontaneous utterance exception should apply because it could be inferred from the circumstances that Arredondo was under the stress from the excitement of the shooting when she spoke to Officer Martinsen.

The court stated that it wanted the prosecutor to lay a further foundation to determine whether the admission of evidence from Arredondo would satisfy the hearsay exception, and that the court was still considering the separate confrontation clause issue.

Thereafter the court conducted an Evidence Code section 402 hearing on the matter. Officer Kane testified during the hearing. Officer Kane stated that there was chaos at the scene of the shooting when she arrived and that the people present were frantic. She stated that she did not recall receiving a piece of paper from anyone. She testified that an unknown Hispanic male approached her and gave her the partial license plate number, "5G577." She stated that she thought she wrote it down. The unknown Hispanic male told Officer Kane that he had seen the license plate number on the white van that left the crime scene heading East on Van Nuys. She stated that the unknown

Hispanic male appeared nervous and upset to speak with police. Officer Kane stated that she gave the information about the license plate number to the "primary unit," which included Officer Martinsen and his partner and to another gang officer. Officer Kane further did not recall speaking with Alex Arredondo or any other witness about the license plate number.

Thereafter, the court stated after hearing Officer Kane that it was satisfied that a sufficient foundation had been laid as to the genesis of the license plate information to meet the requirements of the excited utterance hearsay exception and that the communication did not violate the confrontation clause because it was not "testimonial." The court further indicated that the testimony on the issue that had been presented thus far would not be stricken and that Officer Kane would also be allowed to testify before the jury as to the license plate information. Appellant responded that he disagreed with the court's ruling on the confrontation clause issue.

The prosecutor subsequently presented testimony from Officer Kane, who testified that she had been given the partial license plate number from an unknown Hispanic male.

2. Evidence Code Section 1240

"To come within the spontaneous statement exception to the hearsay rule, an utterance must first purport to describe or explain an act or condition perceived by the declarant. (Evid.Code, § 1240, subd. (a).) There must be evidence that the declarant actually perceived the event to which the statement relates. (*People v. Jones* (1984) 155 Cal.App.3d 653, 660.) "'It must, therefore, appear "in some way, at least, and with some degree of persuasive force" that the declarant was a witness to the event to which his utterance relates. [Citations.] Although this does not require direct proof that the declarant actually witnessed the event and a persuasive inference that he did is sufficient, the fact that the declarant was a percipient witness should not be purely a matter of speculation or conjecture. [Citations.]'" (*People v. Provencio* (1989) 210 Cal.4th 290, 320-303, quoting *Ungefug v. D'Ambrosia* (1967) 250 Cal.App.2d 61, 68.) Nonetheless, even without direct proof that the declarant perceived the event, it may be inferred from

the circumstances that the declarant witnessed it. (*People v. Gutierrez* (2000) 78 Cal.App.4th 170, 178.) For example in *Gutierrez,* the court admitted into evidence a piece of paper which purported to contain a license plate number of the get-away van used in the crime. The paper had been given to the victim a few minutes after the robbery by an unidentified witness. The trial court concluded the information—the license plate number—qualified as an excited utterance under Evidence Code section 1240. The Court of Appeal agreed, concluding that from the circumstances it could be inferred that the witness had actually witnessed the robbery. The court noted that "[h]ad the unidentified man not witnessed the robbery, there would have been no reason for him to write down the license plate number and give it to [the victim]." (*Ibid.*)

Secondly, the statement must be made spontaneously, while the declarant is under the stress of excitement caused by the perception. ([Evid. Code, § 1240], subd. (b).)" (*People v. Farmer* (1989) 47 Cal.3d 888, 901, overruled on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) A "spontaneous" utterance within the meaning of section 1240 is one which is "undertaken without deliberation or reflection." (*People v. Farmer, supra*, 47 Cal.3d at p. 903.) "'The foundation for this exception is that if the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury. [Citation.] [¶] The basis for this circumstantial probability of trustworthiness is "that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief."' [Citation.]" "'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the

circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

It lies within the sound discretion of the trial court to determine whether these foundational requirements of Evidence Code section 1240 are met. "'Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] . . . In performing this task, the court "necessarily [exercises] some element of discretion. . . ."'" (*People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1588-1589.) We will uphold the trial court's determination if its resolution of factual questions is supported by substantial evidence. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) We review for abuse of discretion the ultimate decision whether to admit the evidence. (*People v. Farmer*, *supra*, 47 Cal.3d at p. 904.) With these principles in mind, we turn to appellant's arguments.

Here it appears that Officer Martinsen had two sources for the partial license plate number: (1) Officer Kane, who obtained the information from the unknown Hispanic male; and (2) Alex Arredondo who verified it. Appellant complains to this court that neither source met the requirements of Evidence Code section 1240, and thus the partial plate numbers provided by these witnesses should not have been admitted as an excited utterance.

Preliminarily we note that appellant did not specifically object to the admission of the unknown Hispanic male's statement relating to the partial license plate number at trial on the basis that the statement was hearsay. Because he failed to object on hearsay grounds below, he forfeits any objection on those grounds in this court. (*People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1515.) Nonetheless, even had appellant preserved his objection, in our view, the unknown Hispanic male's statement qualifies as an excited utterance under Evidence Code section 1240.

First, we are persuaded from the circumstances that the unknown Hispanic male witnessed the event. According to Officer Kane, the witness approached her voluntarily and described observing the get-away van, where it had been parked and further related

the direction in which the van drove afterwards. From these statements it is clear that the unknown Hispanic male personally observed the van and had the opportunity to see its license plate number.

Second, there is also sufficient evidence from which it can be reasonably inferred that the unknown Hispanic male provided the information under the stress of having just witnessed the shooting. Officer Kane arrived at the crime scene within 20 minutes of the shooting. She testified that the crime scene was "chaotic" with people running around. She also related that the people present were "frantic." From this description it may be inferred that the unknown Hispanic male statement regarding the license plate number was spontaneous, rather than a product of careful reflection. Moreover, Officer Kane stated that the witness was nervous to be speaking with police.

In light of the foregoing we conclude the unknown Hispanic male's statement to Officer Kane qualified as an excited utterance under Evidence Code section 1240. Because the unknown Hispanic male's statement to Officer Kane was properly admitted and because Officer Kane supplied the information to Officer Martinsen, then Officer Martinsen's testimony concerning the plate number was also admissible. Thus, the court did not abuse it's discretion in overruling appellant's hearsay objection to Officer Martinsen's testimony.

Our conclusion concerning the admissibility of the unknown Hispanic male's statement as a source of Officer Martinsen's testimony, effectively neutralizes appellant's complaint about Arredondo's statement. Because the unknown Hispanic male was a separate source of Officer Martinsen's information, and because we conclude his statement was properly admitted, appellant cannot demonstrate he suffered any prejudice from the admission of the information provided by Arredondo to Officer Martinsen.[7]

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[7] We note that were we to assess the merits of the issue, that is whether Arredondo's statement to Officer Martinsen constituted an excited utterance, we would likely conclude that the statement did not qualify for admission under Evidence Code section 1240. We

In any event, any error with respect to the admission of the license plate number through these witnesses is harmless and did not result in a miscarriage of justice. It is not reasonably likely appellant would have obtained a different result at trial if this evidence had been excluded. Indeed, Espinoza testified as to the partial plate number, and appellant conceded that Espinoza's testimony as to that matter qualified as an excited utterance. In addition, appellant was identified at trial as one of the shooters by three eyewitnesses—Lopez, Espinoza and Garnica. In light of the strong evidence implicating appellant in the crimes, appellant cannot demonstrate he suffered prejudice as a result of the admission of the statements provided by the unknown Hispanic male or Arredondo.

3. Sixth Amendment

Determining the statements were admissible under state law as spontaneous statements does not, however, end our analysis. As appellant observes, out-of-court statements admissible under state-law hearsay exceptions may nonetheless violate the confrontation clause of the Sixth Amendment as construed in *Crawford v. Washington*, *supra*, 541 U.S. 36.[8]

In *Crawford*, the United States Supreme Court held that the use of out-of-court statements by a witness who is unavailable to testify at trial violates the confrontation

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do not doubt that Arredondo verified the license plate number while she was under the influence of the exciting events that had just unfolded. However, we have serious concerns as to whether it can be reasonably inferred that she "perceived" the get-away van and the plate number. As appellant's counsel pointed out during the trial, a few days after the shooting when Arredondo was interviewed by police she described hearing the gun fire and observing the chase, but she expressly denied providing police with the license plate number. Thus, it is not reasonable to infer that she perceived the license plate number. Nonetheless, because of our conclusion with respect to the admission of the unknown Hispanic male's statement, our observations concerning Arredondo's statements are purely academic.

[8] Whether evidence was admitted in violation of the confrontation clause is subject to our independent review. (*Lilly v. Virginia* (1999) 527 U.S. 116, 137; *United States v. Weiland* (9th Cir.2005) 420 F.3d 1062, 1076, fn. 11.)

clause of the Sixth Amendment, if the statements are testimonial in nature and the defendant did not have an opportunity to cross-examine the declarant. If the statements were testimonial, their exclusion is mandatory, even if they qualify for admission under a state-recognized hearsay exception. (*Crawford*, *supra*, 541 U.S. at pp. 53-54, 68.) [9] Here, because neither the unknown Hispanic male nor Arredondo testified at the preliminary hearing or at trial, appellant had no opportunity to cross-examine them. The admissibility of their out-of-court statements to Officer Martinsen and Officer Kane thus depends upon the character of the statements as testimonial or nontestimonial.

In *Crawford*, the Court offered little guidance as to what constitutes a testimonial statement; the *Crawford* court "left a comprehensive definition of 'testimonial' for another day." (*People v. Butler* (2005) 127 Cal.App.4th 49, 58.) In *Davis v. Washington* (2006) 547 U.S. 813,[10] however, the court explained that a statement is "nontestimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." (*Id*. at p. 819.) A statement is testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the

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9 The Court departed from the analysis of *Ohio v. Roberts* (1980) 448 U.S. 56, which had construed the Confrontation Clause to permit the use of hearsay if it possessed "adequate 'indicia of reliability'" (id. at p. 66.), meaning that the out-of-court statement fell within a "firmly rooted hearsay exception" or had "particularized guarantees of trustworthiness." (*Ibid*.)

10 In *Davis* the Court considered whether statements given during 9-1-1 calls constitute "testimonial statements" under *Crawford*. The Court concluded that there are two types of 9-1-1 calls. In the first type, the caller is in danger and is reporting events as they are actually happening. In the second type, the caller is describing past events which can contain testimonial statements. (*Davis v. Washington*, *supra*, 547 U.S. at p. 827, [126 S.Ct. 2266, 2273-2274].)

primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[11] (*Id.* at pp. 819-824.)

The California Supreme Court, in determining when statements to police constitute testimony under the confrontation clause, interpreted *Davis* in *People v. Cage* (2007) 40 Cal.4th 965, and set forth what our Supreme Court considers to be the "basic principles" that are applicable in considering a confrontation issue in the wake of *Davis*. (*Id*. at p. 984.)

The *Cage* court explained, "First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken primarily for the purpose ascribed to testimony-to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to

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[11] The Court did not hold that in order to be testimonial, a statement must be the product of interrogation. Rather, the holdings in *Davis* and *Hammon v. Indiana*, (No. 05-5705) --- U.S. ---- [126 S.Ct. 2266, 2006 U.S. Lexis 4886] which was consolidated for the opinion with *Davis*, referred specifically to interrogations because the statements in those cases were the products of interrogations. However, the court explained that it did not intend to imply that statements made in the absence of any interrogation are necessarily nontestimonial. (*Davis, supra,* 126 S.Ct. at p. 2274, fn. 1.)

produce evidence about past events for possible use at a criminal trial." (*People v. Cage, supra*, 40 Cal.4th at p. 984, fns. omitted.)

Applying these factors to the case at hand, we conclude that the license plate number provided by the unknown Hispanic male and Arredondo to police were nontestimonial in nature. To begin with, the purpose and form of the statements were not the functional equivalents of trial testimony. Both the unknown Hispanic male and Arredondo approached officers of their own accord, and they spoke with officers only a few minutes. There was nothing formal, solemn or structured about the colloquy. As one court has observed, "[p]reliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation.' Such unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police 'interrogation' as that term is used in *Crawford*. [Citations.]" (*People v. Corella* (2004) 122 Cal.App.4th 461, 469.)

Moreover, there can be little doubt the information provided by these witnesses was important in terms of helping the police formulate an appropriate response to the situation. It does not appear the information was elicited or provided for the primary purpose of making a case against appellant at trial. Unlike a criminal prosecutor or a formal police interrogator, the officers who responded to the scene were primarily concerned with what was happening at the moment—the shooting had just occurred about half an hour before and the perpetrators were still at large. It appears that at the time the responding officers were eliciting information in an attempt to assess the present situation and to figure out how to respond to it, not secure a conviction in a court of law. That the statements were later introduced in the criminal trial does not alter this analysis. As *Cage* instructs, "the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality, which, viewed objectively, are for the primary purpose of establishing or proving facts for possible use in a criminal trial." (*People v. Cage*, *supra*, 40 Cal.4th at p. 984, fn. 14.)

Because of the informality, brevity and unstructured nature of the exchange between these witnesses and the officer, and because they were made as the police were in the process of responding to the situation, we conclude the statements to the officers by the unknown Hispanic male and Arredondo were nontestimonial. Therefore, they were outside the scope of *Crawford*.

II. Sufficient Evidence Supported the Jury's Findings on the Gang Enhancements.

Before this court, appellant argues there was insufficient evidence to support the jury's findings on the criminal street gang enhancement on all counts because there was no evidence to show that appellant intend to promote, further or assist in the gang's criminal conduct as required by Penal Code section 186.22, subdivision (b)(1). (See Pen. Code, § 186.22, subd. (b)(1).)

Gang Evidence. The prosecution presented testimony from gang expert, LAPD gang officer Yoro who testified that he was familiar with the PHB gang—appellant's gang and appellant specifically. Officer Yoro described appellant's tattoos indicating his membership in the PHB gang and the fact that appellant was an admitted and documented member of the PHB gang. Officer Yoro described the PHB's gang's territory. He stated that Van Nuys Boulevard was the southern border of the territory claimed by the PHB. He testified the victims' gang, the VBN and PHB had an active rivalry. Officer Yoro stated that this shooting took place in the main territory—in the heart of the VNB gang territory.[12] He also testified that shortly before this shooting a PHB member had been murdered.

Officer Yoro described how gangs operate, how members "put in work" and commit various crimes to gain status for themselves and respect for their gangs. Officer Yoro testified as to PHB's prior crimes and criminal activities, including murder, attempted murder, assault, robbery and various narcotics criminal activities; he also

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[12] Officer Yoro also stated that appellant resided in rival VBN territory, but that such a circumstance would not be unusual.

describe a number of criminal convictions suffered by PHB gang members. Officer Yoro also stated that the hand gesture described by Lopez could be a gang sign—and perhaps indicated an "H." Based on a hypothetical with facts including the display of the hand gestures, the location of the crime, facts of the rivalry, gang memberships of the individuals involved and the manner in which gangs operate, Officer Yoro testified that he believed the shooting was committed for the benefit of appellant's gang.

Officer Cabunoc also testified on appellant's gang involvement and the gang motives. Officer Cabunoc described the Pierce Apartments as the VNB's "main hang out" and stated that at the time the VNB and the PHB were at "war." He further stated that based on his discussions with the detectives investigating the murder of the PHB gang member from the week before this shooting, Cabunoc's review of the evidence, identity of murder victim and the possible suspects in the murder case, Cabunoc believed appellant's actions on May 5, 2007, were to retaliate for the murder of the PHB gang member. As to the evidence of the hand gestures shown to the victims in this case, Officer Cabunoc stated that the PHB gangs flash a "PH" hand signal.

Relevant Legal Principles. A true finding on an allegation of a criminal street gang enhancement, requires proof the crime at issue was committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (Pen. Code, § 186.22, subd. (b)(1).)

Our Supreme Court has repeatedly affirmed the use of expert testimony by law enforcement professionals who have experience in the area of gang culture and psychology to demonstrate a defendant's intent and the gang-related activities to support a finding under Penal Code section 186.22. (See, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*) [expert testimony by police detective particularly appropriate in gang enhancement case to assist fact finder in understanding gang behavior]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-946 [reaffirming *Gardeley* and admissibility of officer's expert testimony in the area of gang culture and psychology]; see also *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1208 [affirming admission

of officer's expert opinion that sole gunman who displayed no gang signs during shooting acted to bolster gang and his own reputation in gang]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384 ["It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.'"].)[13]

Thus, gang expert testimony may properly be admitted to prove motive and intent. (See *People v. Funes* (1994) 23 Cal.App.4th 1506, 1518.) Expert testimony has repeatedly been offered to prove the "motivation for a particular crime, generally retaliation or intimidation" and "whether and how a crime was committed to benefit or promote a gang." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657.) An expert may testify concerning the culture, habits and psychology of gangs because these matters are sufficiently beyond the common experience that the opinion would assist the trier of fact. This includes providing testimony about gang membership, dress, hand signals, graffiti, territory, retaliatory practices. (*Gardeley*, *supra,* 14 Cal.4th at p. 617; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) Indeed, an expert may testify about whether a defendant acted for the benefit of a gang, even though the question is an ultimate factual

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13 We note that the Supreme Court has granted review in a case from Division Six of this court to determine whether substantial evidence supports convictions under Penal Code section 186.22, subdivision (a) (active participation in criminal street gang), and true findings with respect to enhancements under Penal Code section 186.22, subdivision (b), based on a gang expert's testimony that three gang members who raped a young woman committed their crimes for the benefit of and in association with their gang. (*People v. Albillar*, review granted Aug. 13, 2008, S163905.) The Court's opinion may restrict the scope of permissible testimony from gang experts with respect to the required showing under Penal Code section 186.22 that a crime was committed for the benefit of, at the direction of, or in association with a criminal street gang and may also provide guidance as to the type and extent of evidence, in addition to an expert's testimony, necessary to establish a crime is sufficiently gang-related to support a criminal street gang enhancement. Nonetheless, until and unless the Supreme Court issues an opinion providing differently, we are constrained by *Gardeley* and its progeny approving of the admissibility of such opinion testimony.

issue in the case, when these matters are beyond the jury's common experience. (*Valdez, supra,* 58 Cal.App.4th at pp. 507-509.)

Here, appellant is not challenging the evidence that demonstrated he was an active PHB gang member or that the victims, Leon and Bravo were members of the rival VNB gang. Likewise appellant is *not* challenging the legal principle that a gang expert's opinion is sufficient, standing alone to support a true finding on a gang enhancement. Instead, he argues the gang expert's opinion that appellant fired at Bravo and Leon with the intent to promote, benefit or aid his gang, lacks any evidentiary support in the record. In other words, appellant challenges the underlying factual basis of the expert's opinion, claiming that the record lacks support for the opinion. He claims the evidence presented at trial upon which the gang expert based his conclusion the crime was gang motivated, specifically that (a) the crime was committed in VNB territory and that the two gangs were at "war"; (b) this shooting was committed in retaliation for the recent murder of a PHB member; and (c) appellant's cohort flashed gang signs at the victims just before the shooting—was based on speculation and lacked any foundation.

In our view sufficient evidence[14] supported the gang expert's opinions. The undisputed evidence demonstrated appellant was an active and admitted member of the PHB gang. Both gang officers testified that this shooting took place at the main hang out of the VNB gang and that these gangs had an active rivalry. The fact that appellant also apparently lived at that location of the shooting and that Van Nuys Boulevard is a border shared by these gangs, does not undermine the credibility of that expert testimony that the shooting occurred in what was considered to be VNB territory. Likewise, contrary to what appellant argues here, Officer Cabunoc described the basis for his view that this

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[14] When conducting substantial evidence review, we consider the evidence in a light most favorable to the judgment and presume the existence of every fact that can reasonably be deduced from the testimony. (*People v. Lee* (1999) 20 Cal.4th 47, 58; *People v. Crittenden* (1994) 9 Cal.4th 83, 139.) We apply the same standard of review when a case relies in part on circumstantial evidence. (*People v. Lee, supra*, 20 Cal.4th at p. 58; *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

shooting was committed in retaliation for the murder of a PHB gang member the week before. Officer Cabunoc's opinion was based on his discussions with the officers investigating the murder and the evidence in that case. Finally, the hand gestures described by Lopez to the jury were, according to Officer Yoro representative of an "H" which could signify the PHB gang. While Officer Cabonuc offered a different description of the PHB gang hand sign, at most the contradictions as to this and the other gang evidence challenged by appellant in this court, go to the weight of this evidence, not its sufficiency. Based on this evidence, the jury reasonably could have concluded appellant committed the crimes with the specific intent "to promote, further, or assist in . . . criminal conduct by gang members." (Pen. Code, § 186.22, subd. (b)(1).) Consequently, the gang enhancements and the jury's true finding on the enhancements were supported by sufficient evidence.

III. Claim of Sentencing Error

Appellant claims the trial court erred in sentencing him to consecutive 10-year sentence terms on the gang enhancement allegations in counts 1 and 2. He argues that in view of his sentence—45 years to life for each counts 1 and 2, the sentence on the gang enhancement convictions on these counts ran afoul of Penal Code section 186.22, subdivision (b). Appellant is correct.

In *People v. Lopez* (2005) 34 Cal.4th 1002, 1004, the California Supreme Court considered whether a person suffering a conviction for a crime punishable by an indeterminate term years-to-life could also be sentenced to the additional 10-year gang enhancement under Penal Code 186.22, subdivision (b)(1)(C). The Court held that: "first degree murder is a violent felony that is punishable by imprisonment in the state prison for life and therefore is not subject to a 10-year enhancement under section 186.22(b)(1)(C)." (*Id.* at p. 1004.) Instead, the Court found the 15-year minimum parole eligibility term in Penal Code section 186.22, subdivision (b)(5). (*Id.* at pp. 1006-1007.) The Supreme Court's conclusion finds support in Penal Code section 186.22, subdivision (b)(5) which provides that where a gang enhancement is applicable to a conviction

carrying an indeterminate life term, an increased minimum parole restriction is to apply in lieu of the determinate term enhancement set out in subdivision (b)(1).

In view of the foregoing, appellant's sentences on the gang enhancements in counts 1 and 2 cannot stand.

DISPOSITION

The sentence is modified to delete the two 10-year terms based on the true finding under section 186.22, subdivision (b) on counts 1 and 2. The superior court shall modify the abstract of judgment to reflect sentences of 15-years-to-life on the convictions on counts 1 and 2, and shall note a 15-year minimum parole eligibility date on counts 1 and 2 pursuant to section 186.22, subdivision (b)(5). The clerk of the superior court shall forward a copy of the amended abstract of judgment to the Department of Corrections. As so modified, the judgment is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.